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Office Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH MALENO,

*Petitioner*

*v.*

UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Where a defendant was not present at a home of a co-defendant where drugs were seized, can intercepted telephone conversations alone support a conviction for constructive possession with intent to deliver under 21 U.S.C. 841(1)(1) without sufficient proof that the defendant was ever present at the premises or that the intercepted telephone conversations showed the dominion and control required for conviction?

2. Where a DEA agent was qualified as an expert to interpret alleged drug "code" words during a trial and rendered contradictory opinions as to the meanings of those words, did the District Court err in admitting the agent's expert opinions?

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No.

IN THE

# Supreme Court of the United States

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JOSEPH MALENO,

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*v.*

UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH MALENO, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 20, 1984.

## OPINIONS BELOW

On June 21, 1984, the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A-1 - A-2, affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania on September 18, 1983. A Petition for Rehearing En Banc was denied on July 20, 1984, and is reproduced in Appendix B, *infra*, page A-3. On that date the Honorable Louis H. Pollak had sentenced Petitioner to a term of imprisonment for nine years, a special parole period of two years and a $10,000 fine. On July 15, 1983, Judge Pollak rendered a bench opinion, which has not been officially reported, and which relevant portion is reproduced in Appendix C, *infra*, pages A-4. Judge Pollak subsequently filed a supplementary unreported Memorandum, the relevant portions of which are reproduced in Appendix D, *infra*, page A-5.

## JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pages A-1) affirming the judgment of the District Court, was entered on July 20, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Controlled Substances Act, 21 U.S.C. § 841(a)(1), provides in pertinent part:

"§ 841. Prohibited Acts A

Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

## STATEMENT OF THE CASE

The Government indicted 13 people on charges of conspiracy to distribute methamphetamine, unlawful use of a communications facility, possession of methamphetamine with the intent to distribute and continuing criminal enterprise. the charges were dropped against one of the defendants, another defendant's case was served and all but four defendants pled guilty.

Petitioner Joseph Maleno and three co-defendants were tried non-jury before the Honorable Louis H. Pollak resulting in guilty verdicts against all defendants on July 15, 1983. Petitioner Maleno, however, was found not guilty of continuing criminal enterprise but guilty of all other charges and was sentenced to nine years imprisonment, a special parole period for two years, and a $10,000 fine. A timely appeal was filed and on June 21, 1984, the Court of Appeals entered a Judgment Order affirming the conviction and sentence. A Petition for Rehearing En Banc was denied on July 20, 1984.

The evidence adduced at trial consisted of several intercepted telephone conversations and the testimony of DEA Agent Ellis Hershowitz. Over continuous and strenuous objection, the Court permitted Agent Hershowitz to interpret alleged drug "code" words and to interpolate entire phrases and conversations and to put them into a context of a drug conspiracy. This was allowed in spite of the fact that drugs were never mentioned or identified by the speaking parties.

Finally, there was testimony that on July 8, 1982, 371 grams of methamphetamine were taken from the premises of Ellen Morabito, a co-defendant. Petitioner Maleno was not present at that time, nor was any evidence adduced to show presence; but based upon information gained from taped telephone conversations, he was convicted of constructively possessing this methamphetamine with the intent to distribute under 21 U.S.C. § 841(a)(1).

## REASON FOR GRANTING THE WRIT

### I. The District Court Erred in Finding That Intercepted Telephone Coversations Supplied Sufficient Proof That Defendant Maleno Constructively Possessed A Controlled Substance Seized At the Home of Co-Defendant Morabito.

On July 8, 1981, Drug Enforcement Agents pursuant to a search warrant, conducted a raid at the home of co-defendent Ellen Morabito. During that search, the Agents found 371 grams of methamphetamine hidden behind an electrical circuit breaker box in her basement. Defendant Maleno was not present during the raid or at any other time according to the Government's evidence adduced at trial. In convicting Maleno of constructively possessing these drugs, pursuant to 21 U.S.C. § 841(a)(1), the District Court relied solely on telephone conversations between the two defendants.

In the crucial conversations before the raid he referred to "my package" and she, shortly after the raid was heard to tell him that "they got your package." However, there were various other items found during the raid beside the controlled substance which could have been the subject matter of defendant Maleno's package.

There are two severe problems with the District Court's finding and the affirmance by the Third Circuit. First, this Court has stated that a defendant's confiction cannot stand unless each element of a crime is proved beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970). In line with this reasoning, this Court had earlier stated in *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), that a charge of conspiracy cannot be made out by piling inference upon inference as was done in the instant case to find the construc-

tive possession. At least one circuit has adopted this reasoning as regards substantive drug offenses. See, e.g., *United States v. Webster,* 639 F.2d 174, 197-188 (4th Cir. 1981).

A second and equally serious problem involves the standard to be used when courts determine what is constructive possession. All circuits appear to agree that constructive possession requires dominion and control; however, the definition of these terms has been the subject of some dispute.[1]

Since the Third Circuit rendered merely a Judgment Order in this case, it must be presumed that its standard enunciated in *United States v. Martorano,* 709 F.2d 863, 869 (3rd Cir. 1983) is still intact. There the Court stated that dominion and control requires that the defendant be able to reduce the substance involved to actual possession. Similarly in *United States v. Moreno,* 649 F.2d 309 (5th Cir. 1981) the Fifth Circuit required a showing of actual possession. There the Court required the Government to prove physical custody by an employee who is so dominated or controlled by the defendant that the defendant has the ability to reduce constructive possession of the substance to actual possession. Accord: *United States v. Jackson,* 526 F.2d 1236 (5th Cir. 1976); *Mack v. United States,* 326 F.2d 481 (8th Cir. 1964); *United States v. Hernandez,* 290 F.2d 86 (2nd Cir. 1961).

In the case at bar, the telephone conversations cited by the Government are insufficient in any regard to show such domination or control of by Joseph Maleno of Ellen Morabito, who pled guilty to possession of this controlled substance.

By contrast in the recent case of *United States v. Raper,* 676 F.2d 841 (D.C. Cir. 1982), the Court distinguished *Jackson* and its test. In *Raper,* defendant Raper first took money from a third party and then arranged to have his associate Childs give heroin to the third party. The D.C. circuit found that Raper arranged the sale and, thus, actually *controlled* the heroin in Child's physical possession. Thus, the test enunciated there as to dominion and control required the

ability to control the disposal of the drug. Accord: *Lucero v. United States,* 311 F.2d 457 (10th Cir. 1962), *cert. denied,* 83 S. Ct. 883 (1963).

The Ninth Circuit has adopted a test similar to that in *Raper.* In *Arellanes v. United States,* 302 F.2d 603, 606 (9th Cir. 1962), the Court defined dominion and control as "the power of disposal of the drug." Thus, in *United States v. Batimana,* 623 F.2d 1366 (9th Cir.), *cert. denied,* 449 U.S. 1038 (1980), the presence of a defendant in a hotel room along with the heroin, which had been delivered by agents moments before the arrest, was held not to constitute possession. The Sixth Circuit has apparently adopted a similar test in *United States v. Craig,* 522 F.2d 29 (6th Cir. 1975).

Again in the case at bar, the telephone conversations cited by the Government are insufficient in any regard to show "the power of disposal of the drug" or the control necessary to satisfy the tests of the District of Columbia, Sixth, Ninth, and Tenth Circuits.

Due to the insufficient evidence presented which rose to the level of sufficient evidence to convict on the constructive possession count only by the impermissible piling of inference upon inference, and further due to the confusion amongst the Circuits, as to the proper test for dominion and control, this Court should exercise its supervisory powers and take jurisdiction of this matter.

## II. The District Court Erred in Admitting Agent Hershowtiz's Interpretations of the Wiretap Conversations.

The Government's evidence consisted almost entirely of conversations from the wiretaps. During these conversations the word "meth" or "methamphetamine" was not mentioned over strenuous objection to subjectively interpret cruicial words without which interpretations Judge Pollak candidly

admitted that he would not have been able to fathom the content of these calls See Appendix C, infra, p.A-4.

Several circuits have recognized the need for such testimony. See, e.g., *United States v. Cirillo,* 499 F.2d 872, 881 (2nd Cir.), *cert. denied,* 419 U.S. 1056 (1974); *United States v. Alfonso,* 522 F.2d 605, 618 (5th Cir.), *cert. denied,* 434 U.S. 857 (1977); *United States v. Vento,* 533 F.2d 838 (3rd Cir. 1976); *United States v. Bailey,* 607 F.2d 234 (9th Cir. 1979). Although Agent Hershowitz had an extensive background as a DEA agent, his interpretations were often contradictory. Thus, where as here, the interpretations involve more speculation than expertise, those interpretations should be stricken when vigorously objected to.

In the case at bar, Agent Hershowitz testified that the figure "32" was $3200, (app. 390a). "62" became $6200 (app. 393a) yet "almost 13" equalled $13,000, (app. 397a). Similarly, he testified that the term "one" equalled both one ounce of methamphetamine (app. 405a) and one pound of methamphetamine (417a).

Although the agent's interpretations were by his own admission greatly influenced by their context, as he interpreted it during subsequent telephone calls (566a-568a), one wonders how these numbers and identity of substances could be more than mere speculation or educated guesses, at best. In our system of justice requiring proof beyond a reasonable doubt and the presumption of innocence, more than this is necessary. *In Re Winship, supra.*

In *Bailey, supra,* the agent who testified stated that "one" clearly was one ounce and when referring to amounts of money the last two digits were commonly dropped. 607 F.2d at 240 n.6. Moreover, the Court there only allowed the agent to testify as to general "street language" terms used in drug activity and disallowed questions regarding specific alleged code words used by the defendants in their conversations. Id. at 240.

By contrast, in *Cirillo, supra,* the agent was allowed to testify to such terms as "kids out of school," "stuff," "dresses," and "half-filled out income tax forms." 499 F.2d at 881. The same practice was adopted in the case at bar.

In order to settle the confusion among the Circuits and to create proper tests and standards to guide District Courts in the admission of expert testimony in interpreting so-called "code" words in drug cases, this court should exercise its supervisory powers and take jurisdiction in this case.

## CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to both of the questions presented herein.

Respectfully submitted,

MARK D. SCHAFFER
*Counsel for Petitioner*

## APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 83-1683

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UNITED STATES OF AMERICA

*v.*

MALENO, JOSEPH, a/k/a "Whiskey"
*Appellant*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 83-00041-02)
DISTRICT JUDGE: HONORABLE LOUIS H. POLLAK

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Submitted Under Third Circuit Rule 12(6)
June 1984
Before: ALDISERT, HIGGINBOTHAM AND ROSENN, *Circuit Judges.*

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**Judgment Order**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule (126) on June 18, 1984.

Appellant, Joseph Maleno, claims that (1) the district court improperly allowed a DEA agent to identify voices and to translate unambiguous terms into criminal phrases; (2) the district court improperly found that the telephone calls "facilitiated the conspiracy"; (3) the district court improperly found Maleno constructively possessed a controlled substance seized on July 8, 1982; and (4) the district court

improperly found the existence of only one conspiracy as charged by the government.

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court is hearby affirmed.

By THE COURT,

/s/A. LEON HIGGENBOTHOM
*Circuit Judge*

Attest:
/s/ SALLY MRVOS,
Clerk
DATED: June 21, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1683

UNITED STATES OF AMERICA

*v.*

MALENO, JOSEPH, a/k/a "Whiskey"
*Appellant*

*(E.D. Pa. Crim. No. 83-00041-02)*

## SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge, AND SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, AND ROSENN, Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ALDISERT
*Chief Judge*

* * * *

There was some additional testimony of which the most important element was the testimony of the case agent, Agent Hershowitz, who, over substantial defense objection, was permitted to testify as to his interpretation of many of the conversations which were recorded. Agent Hershowitz was sought to be qualified by the Government and I concluded properly so as an expert with respect to the drug trade, a trade which he has been investigating for many ears.

* * * *

I am also satisfied beyond a reasonable doubt that the matter under discussion in the many, many conversations which are the bases for the substantive charges against Mr. Maleno, the so-called telephone counts, the matter under discussion is the distribution of methamphetamine. Here, the expert opinion of Agent Hershowitz becomes highly informing in giving content to conversations, a great many of which were simply in terms of the choice of words used, ambiguous to the lay auditor who was not a participant in any of these conversations, in this instance the factfinder

Without detailing the nature of agent Hershowitz' testimony, suffice it to say that word such as "package" and "piece," words designating numbers, or fractions, phrases referring evidently to price, were through Agent Hershowitz' testimony placed in a frame where the conclusion that the matter under discussion was the business of distributing methamphetamine as opposed, for example, to a drug or other commodity in another price bracket, is irresistible.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 83-1683

UNITED STATES OF AMERICA

*vs.*

JOHN DI SALVO
JOSEPH MALENO
JOHN MALENO
ELLEN MORABITO
DOMINIC FLORIO
RALPH PULTRONE
YVETTE LOBIONDO
ANTHONY ORLANDO
RENEE RUTH
SOPHIE VEASEY
ZIGMUNT KREJCZMAN

## MEMORANDUM

**POLLAK, J.** **JULY 18, 1983**

On Friday, July 15, I announced from the bench the verdicts, and certain of the supporting findings, in the bench trial of John DiSalvo, Joseph Maleno, Dominic Florio and Ralph Pultrone. On reflection, I have concluded that placing on the record certain additional findings might further illuminate the processes of factual analysis underlying the verdicts. Neither what was said from the bench on July 15, nor what is set forth in this Memorandum, makes any claim to being a comprehensive canvass of the evidence relied on.*

*No Rule 23(c) request was made that the court find the facts specially.

I. In my bench statement on July 15 I did not explicate the guilty verdict announced under Count 47, which charged Joseph Maleno with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). I should have explained that the verdict was predicated on a finding that Joseph Maleno was, beyond a reasonable doubt, in constructive possession of the methamphetamine seized, pursuant to a search warrant, by Agent Hershowitz and his fellow agents in the home of Ellen Morabito. That methamphetamine was, I find, the "package" which Mr. Maleno, in an intercepted telephone conversation, instructed Ms. Morabito to keep safely for him.

* * * *